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SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1138

RON PATTERSON - - - - - **Petitioner**

versus

COMMONWEALTH OF KENTUCKY - **Respondent**

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION PRESENTED

I. **Whether KRS 514.040(4)(b) Complies with the Requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?**

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1138

RON PATTERSON - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion Below from the Court of Appeals of Kentucky is styled Ron Patterson v. Commonwealth, 556 S. W. 2d 909 (1977). The Supreme Court of Kentucky declined on November 14, 1977, to exercise its judicial discretion to review the Opinion of the Court of Appeals of Kentucky. The Opinion and Order denying review are correctly set forth in the petitioner's Appendix at page 11 of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court has fulfilled the initial requirements of 28 U.S.C. § 1257(3). Respondent submits, nevertheless, that petitioner's application for writ of certiorari should be denied since the issues presented therein do not comply with the prerequisites of Rule 19.

In his petition, the petitioner raises the contention that the presumption of intent as set forth in KRS 514.040 violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Petitioner further alleges that the presumption is irrational and arbitrary.

It should be noted that the petitioner's question has been resolved in this Court's decision of *Barnes* v. *United States,* 412 U. S. 837 (1973). The Court of Appeals of Kentucky specifically relied on the holding of *Barnes, supra,* in concluding that the statutory presumption did not violate the Due Process Clause.

As stated in Rule 19 of the Supreme Court Rules, the granting of a review on a petition for writ of certiorari is purely within the discretion of the court. Ordinarily a writ will be granted only where there are special and important reasons therefor. See *Hardin* v. *Kentucky Utilities Company,* 390 U. S. 1 (1968); *United States* v. *Oregon,* 366 U. S. 643 (1961); and *Rudolph* v. *United States,* 370 U .S. 269 (1962).

Since this issue has previously been resolved, the contention as presented in the petition is insufficient to invoke the discretionary jurisdiction of this Court under Rule 19.

In order to fully apprise this Court as to the nature of the issue involved, the respondent will reply to the argument of the petitioner as if the contention were properly before the Court. A review of this argument by the Court will demonstrate the validity of the respondent's contention that the granting of the application for writ of certiorari is not desirable.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Kentucky Revised Statutes 514.040.

"(1) A person is guilty of theft by deception when he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

"(a) Creates or reinforces a false impression, including false impressions as to law, value, intention or other state of mind; or

"(b) Prevents another from acquiring information which would affect his judgment of a transaction; or

"(c) Fails to correct a false impression which the deceiver previously created or reinforced or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship; or

"(d) Fails to disclose a known lien, adverse claim or other legal impediment to the enjoyment of property which he transfers or encumbers in consideration for the property obtained, whether

such impediment is or is not valid or is or is not a matter of official record; or

"(e) *Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.*

"(2) The term 'deceive' does not, however, include falsity as to matters having no pecuniary significance or puffing by statements unlikely to deceive ordinary persons in the group addressed.

"(3) Deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

"(4) *For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid, if:*

"(a) The issuer had no account with the drawee at the time the check or order was issued; or

"(b) *Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the issuer failed to make good within ten (10) days after receiving notice of that refusal.*

"(5) Theft by deception is a Class A misdemeanor unless the value of the property is $100 or more, in which case it is a Class D felony."

(Emphasis is supplied for purposes of pointing out to this Court the exact statutory provision involved within the context of the statute.)

CONSTITUTION OF THE UNITED STATES
AMENDMENT XIV

SECTION 1

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

COUNTERSTATEMENT OF THE CASE

Ron Patterson, a thirty-six (36) year old Baptist minister, had a part-time job selling handcrafted leather goods to retail outlets. While selling his leather wares, Patterson became acquainted with one John Rankin of Rankin & Grider, Inc., importers and exporters of leather products with offices in Nicholasville, Kentucky. Patterson sold Rankin some watch bands and Rankin told Patterson he could sell him some leather ponchos at a low price. As a result, Patterson on October 9, 1975, ordered from Rankin a large quantity of ponchos. The sale amounted to $2,955.04 for which Patterson gave his check, No. 113. At this time, Rankin and Patterson discussed Rankin ordering some $10,000.00 worth of leather goods for Patterson at a substantial discount to Patterson. Check No. 113 was deposited by Rankin in his bank on October 10, 1975, and on October 17th the check was returned

by the drawee bank, First and Farmers National Bank of Somerset, Kentucky, with a slip explaining that there were insufficient funds in the account of the drawer, Patterson, to cover the check. On the same date Rankin told Patterson that "the check had come back insufficient funds and he told me to run it back through again." On October 18th Rankin ran the check through the bank again. The check "bounced" again for insufficient funds. The check was returned to Rankin on October 24th. From this point the testimony is in conflict on whether the $1,000.00 money order received by Rankin from Patterson on October 28th and an additional $400.00 money order received by Rankin from Patterson on November 6, 1975, were in part payment for check No. 113 or on open account for the later ordered goods in the amount of $7,000.00. In any case, Rankin, after discussing the "cold check" No. 113 with Patterson some eighteen (18) times, filed suit in Jessamine Circuit Court. An arrest order was issued and Patterson was indicted for violation of KRS 514.040. Upon trial by a jury, appellant was found guilty and sentenced to one (1) year in the penitentiary.

ARGUMENT

KRS 514.040(4)(b) Complies with the Requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

KRS 514.040(4)(b) provides:

> "(4) For purposes of subsection (1), an issuer of a check or similar sight order for payment of money is *presumed to know* that the check or order, other than a postdated check or order, would not be paid, if:
>
> . . .
>
> (b) Payment was refused by drawer for lack of funds, upon presentation within thirty (30) days after issue, and issuer failed to make good within ten (10) days after receiving notice of that refusal." (Emphasis added.)

Simply put, the statute allows an inference of knowledge that a check would not be paid if within ten days after refusal of payment by the drawee, sufficient funds are not placed into the drawer's account to cover the refused check. The issuer, of course, can remedy the problem by simply giving the payee the funds and destroying the refused check. This inference goes to knowledge of the issuer that the check would not be paid. Such knowledge constitutes the element of intent to deceive which is a criminal offense under KRS 514.040(1).

In effect, the presumption enables the Commonwealth to establish a prima facie case. This presumption is rebuttable, but until the presumption is rebutted, the Commonwealth has met its burden of proof.

Appellant has attacked this presumption as irrational, arbitrary and unconstitutional. Although it is not stated as such by the appellant, it can be safely assumed that the appellant considers KRS 514.040(4)(b) as being unconstitutional for violating the Fourteenth Amendment due process clause of the United States Constitution.

It must be noted at the onset that there are no reported Kentucky cases that have considered the constitutionality of this particular statutory presumption. Nor are there any United States Supreme Court cases that have considered this precise point. There are, however, a number of United States Supreme Court cases that have established a standard for determining whether a statutory presumption satisfies the due process requirements of the Fourteenth Amendment. *Barnes* v. *United States,* 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973) is perhaps the most definitive. In *Barnes,* the appellant had been convicted of receiving stolen goods. Part of the instructions given to the jury provided for an inference of guilt from the unexplained possession of stolen goods. In upholding the constitutionality of such a presumption the United States Supreme Court said:

> "[1] The teaching of the foregoing cases is not altogether clear. To the extent that the 'rational connection,' 'more likely than not,' and 'reasonable doubt' standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to differences of substance. What has been established by the cases, however is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process." *Barnes, supra* at page 843.

Accord *Turner* v. *United States,* 396 U. S. 398, 90 S. Ct. 642, 24 L. Ed. 2d 610 (1970), *Leary* v. *United States,* 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969), *United States* v. *Romano,* 382 U. S. 136, 86 S. Ct. 279, 15 L. Ed. 2d 210 (1965), *United States* v. *Gainey,* 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

An alternative standard was set forth in *Leary* v. *United States, supra.* In *Leary,* the United States Supreme Court said that a statute authorizing the inference of one fact from the proof of another must be subjected to scrutiny by the courts to prevent "conviction upon insufficient proof." A statutory presumption would be struck down according to this Court unless:

> "it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary, supra* at page 36.

Appellant cites this standard as being the one that should be followed by this court. The Commonwealth has no quarrel with this contention. The *Barnes* standard, however, should also be adhered to by this Court.

The appellant's argument is directly refuted by *State* v. *Haremza,* 213 Kan. 201, 515 P. 2d 1217 (1973). *Haremza, supra,* is precisely on point with the case at bar. In *Haremza,* the appellee-defendant had successfully argued before the district court of Kansas that the Kansas Statute 21-3707(2) was void and unenforceable under the Fourteenth Amendment. As part of his argument, the appellee advanced the theory that the

presumption that flowed from the failure to make good a bad check within seven days after notice that the check had been refused was contrary to the reasonable doubt standard of the due process clause.

In reversing the district court and upholding the constitutionality of the presumption, Justice Prager of the Supreme Court of Kansas said:

> "The general rule universally applied throughout the United States is that a statutory presumption will be upheld as constitutional if in accordance with experience of mankind, there is a natural and rational evidentiary relation between the fact proven and the one presumed." *Haremza, supra* at page 1221.

In applying the standard as set forth in *Leary, supra,* and *Barnes, supra,* concluded:

> "We have no hesitancy in holding in this case that the statutory presumption created by 21-3707 (2) does not constitute a denial of due process of law and satisfies the requirements set forth in the cases above. *We find that there is a natural and rational evidentiary relationship between the fact proved and the fact presumed and* . . . where a person has written an insufficient funds check and received property or other consideration therefore from the payee of the check and further where the maker of the check has been notified that the check has not been paid and fails to make payment within seven days after such notice, we find that *there is nothing unreasonable or arbitrary in making such fact prima facie evidence of fradulent intent or guilty knowledge.*" *Haremza, supra* at 1223 (Emphasis added).

Accord *State* v. *Powell,* 220 Kan. 168, 551 P. 2d 902 (1976).

Numerous other jurisdictions and authorities have similarly held that the presumption contained in KRS 514.040(4)(b) bears a rational relationship to the fact proved. See *Stevens* v. *State,* (Fla.) 324 So. 2d 190 (1975), *State* v. *Campbell* (Idaho), 543 P. 2d 1171 (1975), *State* v. *Callahan,* (Conn.), 183 A. 2d 861 (1962), *State* v. *Morris,* (Kan.), 372 P. 2d 282 (1962), *Flannigan* v. *State,* (Md.), 191 A. 2d 591 (1963), *State* v. *Eggers,* (Neb.), 120 N. W. 2d 541 (1963). See also Torcia, *Wharton's Criminal Evidence,* §94 (13 ed. 1972) where it said:

> "By way of illustration, the constitutionality of the following presumptions has been sustained . . . . the issuance of a check drawn on a bank in which the drawer does not have sufficient funds to pay the check is prima facie evidence of his intent to defraud by means of a worthless check." *Torcia, supra.*

at 155, citing *Berry* v. *State,* 153 Ga. 169, 111 S. E. 669, 35 A.L.R. 370 (1922).

As can be seen from the foregoing authorities, appellant's contention that the presumption found in KRS 514.040 is arbitrary and irrational is completely without merit.

CONCLUSION

For the reasons stated in the respondent's brief, the petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of March, 1978, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari, by placing three (3) copies of the same in the United States mail, first-class postage prepaid, and addressed to Honorable Dale B. Mitchell, Mitchell & Gillum, P. O. Box 111, Somerset, Kentucky 42501, Counsel for Petitioner, and served the Commonwealth's Attorney by placing one (1) copy of same in the United States mail, first-class postage prepaid, and addressed to Honorable Harlan Veal, Commonwealth's Attorney, Main Street, Nicholasville, Kentucky 40356.

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